



The following constitutes the
Memorandum Decision of the Court.
Signed February 2, 2017



Roger L. Efremsky
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re

FLORO T. ZARATE AND
PATRICIA G. ZARATE,

Debtors.

Case No. 14-42250 RLE
Chapter 7

JOSEPH AND JULIANA TABURAZA,
et al.,

Plaintiffs,

vs.

FLORO T. ZARATE AND
PATRICIA G. ZARATE,

Defendants.

Adversary Proceeding
No. 14-4119

Memorandum Decision on
Plaintiffs' Motion for
Attorney's Fees and Costs
and Order Thereon

I. Introduction

On September 15, 2016, the court entered a stipulated
judgment in favor of plaintiffs Joseph and Juliana Taburaza. The

1 judgment states that defendants owe a non-dischargeable debt of
2 \$831,018.31 to plaintiffs. October 13, 2016, plaintiffs filed
3 this motion for an award of attorney's fees and costs as the
4 prevailing party in the adversary proceeding. Defendants opposed
5 this motion. The matter has been fully briefed and argued. This
6 is the court's findings of fact and conclusions of law as
7 required by Fed. R. Bankr. P. 7052.¹

8 9 **II. Background**

10 **a. The 2005 Aset Purchase Agreement**

11 In June 2005, the parties entered into an Asset Purchase
12 Agreement (the "APA") by which defendants agreed to sell two
13 skilled nursing facilities (the "Facilities") to plaintiffs.
14 Defendants operated the Facilities through Tru-Care, Inc., a
15 California corporation. Defendants owned a 60% interest, and
16 plaintiffs owned a 40% interest, in the Tru-Care shares and in
17 the two pieces of real property (known as "Milpitas" and
18 "Wisteria") on which the Facilities operated. APA, Recital A.

19 The transaction contemplated by the APA was a transfer to
20 plaintiffs of defendants' Tru-Care shares or the Tru-Care assets,
21 and of defendants' 60% interest in Milpitas and Wisteria. At
22 closing, plaintiffs were to pay the secured debt on Milpitas and
23 Wisteria and assume certain obligations of the business including
24 certain tax debts. APA, §2.1-2.4.

25 ¹Unless specified otherwise, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §101-1532; all
27 "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure, Fed. R. Bankr. P. 1001-1037; all "Civil Rule"
references are to the Federal Rules of Civil Procedure, Fed. R.
Civ. P. 1-86.

1 Relevant to this dispute, Recital C of the APA described
2 what plaintiffs agreed to pay as the "major obligations" and
3 "estimated balances" related to Milpitas, Wisteria, and Tru-Care:
4 two secured loans on Milpitas totaling \$1,275,791; two secured
5 loans on Wisteria totaling \$812,188; \$28,000 owed under a
6 settlement agreement; \$100,000 owed to an individual named Vicki
7 Gaceta Smith; and estimated employment tax obligations of
8 \$400,000. APA, Recital C.

9 The closing was to take place 90 days after execution of the
10 APA. APA, §6.1. The defendants were to manage the Facilities
11 until plaintiffs obtained the required regulatory approvals to
12 operate the Facilities. APA, §3.1. Section 3.1 stated that
13 defendants would not incur any new liabilities except in the
14 ordinary course of business during this interim period. Article 4
15 described defendants' representations and warranties. Defendants
16 represented that there were no unpaid tax debts other than the
17 \$400,000 disclosed in Recital C, and that their representations
18 were true and did not omit anything material. APA, §4.1(d) and
19 §4.1(t).

20 If plaintiffs were unable to obtain the regulatory approvals
21 by the contemplated 90-day closing date, plaintiffs could extend
22 the closing date by 6 months. APA, §8.1(a)(i). In addition, if
23 the regulatory approvals were not obtained in the extended 6
24 month period, plaintiffs could either proceed or elect not to
25 proceed with the purchase. APA, §8.1(a)(ii).

26 Article 11, entitled Post Closing Covenants, contained the
27 following provision:

1 11.6(a) Sellers agree to defend, indemnify and hold Buyers
2 ... harmless from and against any and all loss, damage,
3 liability, action or proceeding, including without
4 limitation, attorney's fees, ("Loss") resulting from or
arising out of (i) any inaccuracy in or breach of any
representation, warranty, covenant, or obligation made or
incurred by Sellers herein or in any other agreement.

5 Section 11.6(b) provided the same protection to Sellers. Section
6 11.6(c) described the procedures to be followed "[i]f any legal
7 proceedings shall be instituted or any claim is asserted by any
8 third party in respect of which any Party may be entitled to
9 indemnity hereunder." APA, §11.6(c).

10 Article 12, entitled Miscellaneous, contained the following
11 provision:

12 §12.9 Attorneys Fees. In event suit is brought or an
13 attorney is retained by any party to this Agreement to
14 enforce the terms of this Agreement or to collect any moneys
15 due hereunder, the prevailing party shall be entitled to
recover reimbursement for reasonable attorneys' fees, court
costs, costs of investigation and other related expenses
incurred in connection therewith.

16 **b. The 2009 Amendment to the Asset Purchase Agreement**

17 For reasons that are not entirely clear, the closing did not
18 take place as described in the APA and it may never have taken
19 place. However, in 2009, the parties executed the First Amendment
20 to Purchase Agreement and Assignment and Assumption Agreement
21 (the "2009 Agreement"). The 2009 Agreement incorporated the
22 provisions quoted above. It also stated that the parties had
23 entered into a management agreement and a lease of the Mipitas
24 and Wisteria real properties effective as of April 1, 2009 or the
25 date plaintiffs received regulatory approval.

26 According to Recital C of the 2009 Agreement, the APA was
27 amended to allow plaintiffs to waive their due diligence closing

1 conditions, amend the closing date, amend certain representations
2 and warranties in connection with the management agreement, and
3 update the outstanding financial obligations relating to Milpitas
4 and Wisteria and the business. 2009 Agreement, Recital C.

5 Section 6 of the 2009 Agreement, entitled Amended Financial
6 Obligations, provided that Recital C of the APA was replaced with
7 a new listing of the "major obligations" and their "estimated
8 balances" as of April 1, 2009. The new list included the two
9 secured loans on Milpitas with slightly lower balances totaling
10 \$1,193,437, and the two secured loans on Wisteria with slightly
11 lower balances totaling \$753,080; the same \$100,000 owed to the
12 individual named Vicki Gaceta Smith, and the same \$400,000
13 estimated employment tax obligation. 2009 Agreement, §6.

14 Plaintiffs later discovered defendants had failed to
15 disclose significant liabilities. This prompted plaintiffs to sue
16 defendants in state court for breach of contract and obtain a
17 \$1.34 million default judgment.

18 **c. The Complaint and Answer**

19 Soon after defendants filed their bankruptcy case,
20 plaintiffs initiated this adversary proceeding. AP Docket no. 1.
21 The first claim for relief was based on a theory of fraud in the
22 inducement under §523(a)(2)(A). The essential allegations were
23 that defendants had, with intent to deceive, "misrepresented
24 facts, concealed and failed to disclose" material facts in order
25 to induce plaintiffs to enter into the 2009 Agreement, resulting
26 in damage of \$1.34 million. In the prayer, plaintiffs sought
27 judgment for the amount of this debt plus pre-judgment interest,

1 contractual attorneys fees, costs, and disbursements.²

2 Defendants answered the complaint, generally denying its
3 essential allegations. AP docket no. 8.

4 **d. The Summary Judgment Rulings**

5 In July 2015, plaintiffs filed a motion for summary
6 judgment. AP docket nos. 20-24, 26. In response, defendants
7 admitted they had failed to disclose multiple material
8 obligations and admitted that a debt of some amount was non-
9 dischargeable but that plaintiffs had not established the amount
10 of the damages resulting from the defendants' non-disclosures. AP
11 docket nos. 27-28.

12 Plaintiffs filed supplemental declarations in an effort to
13 establish the amount of their damages. AP Docket nos. 37, 39.
14 Defendants responded that the plaintiffs had again failed to
15 prove their damages. AP docket no. 38. At the hearing held on
16 January 7, 2016, the court found that plaintiffs had failed to
17 establish their damages with any precision and summary judgment
18 was denied except as to \$32,468 for certain unpaid medical
19 insurance premiums.

20 At this point, the parties agreed to attend judicial
21 mediation. However, this mediation was ultimately unsuccessful
22 and in May 2016, the court set a trial date of August 25, 2016.

23 **e. The Stipulated Judgment**

24 At the beginning of the trial on August 25, 2016, the
25 parties announced that they had reached a settlement by which

26 ²All other claims for relief in the complaint were abandoned
27 prior to trial.

1 defendants agreed that \$831,018.31 was a non-dischargeable debt.
2 On September 15, 2016, the court entered the judgment. AP docket
3 no. 71.

4 **f. The Motion for Attorney's Fees**

5 On October 13, 2016, plaintiffs filed this motion for an
6 award of attorney's fees and costs. AP docket nos. 73-75. The
7 motion seeks an award of \$316,887.00 in attorney's fees pursuant
8 to Rule 7054, California Code of Civil Procedure §1021 and §1032,
9 and California Civil Code §1717, and \$11,748.25 in costs pursuant
10 to 28 U.S.C. §1920. (Plaintiffs' motion repeatedly refers to
11 "California Code of Civil Procedure §1717" which is obviously
12 incorrect. The section is California Civil Code §1717.)

13 Defendants' opposition argues that the motion is untimely
14 because Civil Rule 54(d)(2)(B), applicable here by Rule
15 7054(b)(2), requires such a motion to be filed no later than 14
16 days after the entry of judgment. The opposition also argues that
17 fees are not allowed under California law because this was not an
18 action on a contract; it was a tort action based on a fraud in
19 the inducement theory. Finally, defendants argue that the
20 requested fees and costs are excessive because the request
21 includes fees and costs incurred in the state court litigation.
22 AP docket no. 82.

24 **III. Discussion**

25 **a. Timeliness of the Motion**

26 The court will first dispose of the defendants' timeliness
27 argument. It is true that the motion was not filed within 14 days

1 of entry of the judgment as required by Rule 7054(b)(2) which
2 makes Civil Rule 54(d)(2)(B)(i) applicable here. It is also true,
3 as defendants point out, that neither defendants nor the court
4 agreed to any extension of time. However, the discussion on the
5 record on August 25, 2016, when the parties announced their
6 settlement, may have led plaintiffs to believe that filing this
7 motion within 30 days was acceptable.

8 The court does not necessarily agree with this
9 interpretation. Nevertheless, if plaintiffs had sought an order
10 extending their time under Rule 9006 and the relevant excusable
11 neglect analysis under Pioneer Investment Services Co. v.
12 Brunswick Assoc. Limited Partnership, 507 U.S. 380 (1993), the
13 court would have exercised its discretion to grant it. To the
14 extent necessary, the court grants such an extension now. For
15 these reasons, the court will consider the motion timely and deal
16 with it on its merits.

17 **b. Statutory Framework for Attorney's Fees**

18 Under the American Rule, the prevailing party is ordinarily
19 not entitled to collect a reasonable attorney's fee from the
20 loser. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S.
21 240, 247 (1975). This default rule can be overcome by statute and
22 by contract. Travelers Cas. and Sur. Co. of America v. Pacific
23 Gas and Elec. Co., 549 U.S. 443, 448 (2007).

24 California follows the American Rule. California Code of
25 Civil Procedure §1021 says "[e]xcept as attorney's fees are
26 specifically provided for by statute, the measure and mode of
27 compensation of attorneys ... is left to the agreement, express

1 or implied, of the parties." Section 1021 allows the parties to
2 agree that the prevailing party in litigation may recover
3 attorney's fees, whether the litigation sounds in contract or in
4 tort. 3250 Wilshire Blvd. Bldg. v. W.R. Grace & Co., 990 F.2d
5 487, 489 (9th Cir. 1993) (language of agreement determines
6 whether party entitled to fees or costs; agreement covered tort
7 claims because it covered suits with "respect to subject matter
8 or enforcement" of agreement); Xuereb v. Marcus & Millichap,
9 Inc., 3 Cal.App.4th 1338, 1341 (1992) (agreement providing for
10 fees and costs in any "lawsuit or other legal proceeding" to
11 which the "agreement gives rise" was broad enough to cover
12 contract and tort claims).

13 Code of Civil Procedure §1032(b) says "except as otherwise
14 expressly provided by statute, a prevailing party is entitled as
15 a matter of right to recover costs in any action or proceeding."
16 Code of Civil Procedure §1033.5 lists the items that are
17 allowable as costs under §1032. Attorney's fees are included in
18 costs "when authorized by contract." Code Civ. Proc.
19 §1033.5(a)(10)(A).

20 Under California Civil Code §1717(a), "in any action on a
21 contract, where the contract specifically provides that
22 attorney's fees and costs which are incurred to enforce that
23 contract, shall be awarded either to one of the parties or to the
24 prevailing party, then the party who is determined to be the
25 party prevailing on the contract, whether he or she is the party
26 specified in the contract or not, shall be entitled to reasonable
27 attorney's fees in addition to other costs."

1 Civil Code §1717 does not apply to tort claims; it
2 determines which party, if any, is entitled to attorney's fees on
3 a contract claim. Stout v. Turney, 22 Cal.3d 718, 730 (1978)
4 (action for fraud arising out of a contract to sell real property
5 was not an action on a contract within the meaning of Civil Code
6 §1717); Santisas v. Goodin, 17 Cal.4th 599, 615 (1998) (complaint
7 alleging failure to disclose defects in sales transaction sounded
8 in tort and was entirely outside the scope of Civil Code §1717).

9 Against this background, the questions are whether this
10 §523(a)(2)(A) case was an "action on a contract," and, if not,
11 whether the attorney's fee provisions in the APA are broad enough
12 to cover a tort claim.

13 **c. Code of Civil Procedure §1021 - Language of the Agreement**

14 The attorney's fee provision in §12.9 of the APA provided:

15 In event suit is brought or an attorney is retained by any
16 party to this Agreement to enforce the terms of this
17 Agreement or to collect any moneys due hereunder, the
18 prevailing party shall be entitled to recover reimbursement
for reasonable attorneys' fees, court costs, costs of
investigation and other related expenses incurred in
connection therewith.

19 The basic goal in contract interpretation is to give effect
20 to the parties' mutual intent at the time of contracting. When a
21 contract is reduced to writing, the parties' intention is
22 determined from the writing alone, if possible. Cal. Civ. Code
23 §1639. The words of a contract are to be understood in their
24 ordinary and popular sense. Cal. Civ. Code §1644.

25 While the case law in this area is not a model of clarity,
26 there are several cases that guide the court in interpreting an
27 attorney's fee provision such as this one. In short, provisions

1 such as §12.9 - by its terms limited to *enforcement* of the terms
2 or *collection* of what is owed - have been held not to extend to
3 fees incurred in litigating tort claims. Exxess Electronixx v.
4 Heger Realty Corp., 64 Cal.App.4th 698, 707-708 (1998) (an action
5 or proceeding to "enforce the terms or declare rights" under a
6 lease did not cover fraud claims); Sharma v. Salcido (In re
7 Sharma), 2013 WL 1987351, *18 (9th Cir. B.A.P. 2013) (suit to
8 "enforce or interpret" a settlement agreement did not cover fees
9 in a §523(a)(2)(A) case involving fraud in inducement of
10 settlement agreement). In contrast, provisions with broader
11 language - suits arising from or with respect to the subject
12 matter or enforcement of a contract - have been held to extend
13 to fees incurred in litigating tort claims. 3250 Wilshire Blvd.
14 Building v. W.R. Grace & Co., 990 F.2d 487, 489 (9th Cir. 1993)
15 (contract providing for fees for any suit with respect to "the
16 subject matter or enforcement" of contract covered tort claims);
17 Santisas v. Goodin, 17 Cal.4th 599, 608 (1998) (agreement for
18 fees for any "litigation arising out of the execution" of
19 agreement or sale of property covered tort claims); Xuereb v.
20 Marcus & Millichap, Inc., 3 Cal.App.4th 1338, 1341 (1992)
21 (agreement providing for prevailing party fees in "any lawsuit or
22 other legal proceeding to which it gives rise" covered tort
23 claims including events that occurred prior to agreement's
24 formation).

25 Plaintiffs argue that their intention was to have the
26 attorney's fee provision in §12.9 of the APA cover this
27 litigation. While their subjective intention is not relevant

1 here, if that was in fact their intention, the language they
2 chose - enforce or collect - did not convey that meaning. The
3 court will not rewrite the APA for them at this point. Plaintiffs
4 are not entitled to an award of attorney's fees under this
5 provision of the APA. They did not seek to enforce the APA or the
6 2009 Agreement by this adversary proceeding; they sought damages
7 for fraud based on §523(a)(2)(A).

8 **d. Civil Code §1717 - Action on a Contract**

9 Plaintiffs argue that their §523(a)(2)(A) claim was an
10 "action on a contract" because fraudulent misrepresentations or
11 omissions were made in the representations and warranties in the
12 2009 Agreement which induced plaintiffs to proceed with the
13 transaction. Defendants counter that it was instead a tort case
14 relying on a theory of fraud in the inducement regarding the 2009
15 Agreement.

16 The Ninth Circuit instructs this court to look to California
17 law to determine whether this was an action "to enforce or avoid
18 enforcement" of a contract to determine whether Civil Code §1717
19 applies. Penrod v. AmeriCredit Financial Services, Inc. (In re
20 Penrod), 802 F.3d 1084 (9th Cir. 2015).

21 First, under established California law, a tort claim does
22 not "enforce" a contract. Stout v. Turney, 22 Cal.3d 718, 730
23 (1978); Santisas v. Goodin, 17 Cal.4th 599, 615 (1998).

24 Second, the dischargeability of a debt under §523(a)(2)(A)
25 resolves a tort claim. Candland v. Ins. Co. of N. Am. (In re
26 Candland), 90 F.3d 1466, 1470 (9th Cir. 1996) (discussing
27 elements of §523(a)(2)(B) case). To prevail on a §523(a)(2)(A)

1 theory, and the analogous common law fraud theory, a plaintiff
2 must prove (1) the debtor made a misrepresentation or fraudulent
3 omission; (2) with knowledge of its falsity; (3) with the
4 intention of deceiving the creditor; (4) that the creditor relied
5 on the representation; and (5) the creditor sustained damage as a
6 proximate result. Turtle Rock Meadows Homeowners Ass'n v. Slyman
7 (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000) (all five
8 elements of common law fraud under California law must be proven
9 to support non-dischargeability under §523(a)(2)(A)).

10 The court does not find plaintiffs' analysis of this issue
11 persuasive. Plaintiffs cite Heritage Ford v. Baroff (In re
12 Baroff), 105 F.3d 439, 443 (9th Cir. 1997) for the general idea
13 that courts interpret liberally whether an action is on a
14 contract. Plaintiffs then cite Bos v. Board of Trustees, 818 F.3d
15 486, 489 (9th Cir. 2016) for the uncontroversial proposition that
16 three conditions must be satisfied for an action to be considered
17 on a contract: the contract must contain a provision regarding
18 the award of fees to one of the parties; the action in which the
19 fees are incurred must be on a contract, the party seeking fees
20 must have prevailed.³ From this point, plaintiffs leap to three
21 broad statements: an action is on a contract if it (1) "involves"
22 a contract (citing In re Tobacco Cases I, 193 Cal.App.4th 1591,
23 1601 (2011)); (2) seeks to enforce a contract (citing Penrod, 802
24 F.3d at 1088); or (3) seeks to determine rights or duties under a

25
26 ³There is no question that the first and third conditions
27 are satisfied. The only issue here is whether this adversary
proceeding was an action on a contract.

1 contract (citing Exxess Electronixx v. Heger Realty Corp., 64
2 Cal.App.4th 698, 707 (1998)).

3 In In re Tobacco Cases I, after acknowledging that
4 California courts liberally interpret the phrase on a contract,
5 the court held that litigation involving the enforcement of a
6 consent decree was an action on a contract for purposes of Civil
7 Code §1717. In re Tobacco Cases I, at 1600-1601. This case sheds
8 no light on the issue before the court. In Penrod, the Ninth
9 Circuit held that a creditor's objection to confirmation of a
10 chapter 13 plan was an action on a contract because the source of
11 the right asserted in the objection was a provision of the
12 contract and resolution required interpretation of the contract.
13 Penrod, at 1088. Penrod provides no support for plaintiffs'
14 argument; whether that contested matter involved a tort claim was
15 not an issue. In Exxess Electronixx, after stating that tort
16 claims for breach of fiduciary duty and constructive fraud did
17 not enforce the terms of a lease, the court did say a declaratory
18 relief action sounded in contract. Exxess, at 710. This adversary
19 proceeding is not a declaratory relief action and Exxess provides
20 no support for plaintiffs' claim that Civil Code §1717 applies
21 here.

22 While plaintiffs cite Bos v. Board of Trustees, 818 F.3d
23 486, 489 (9th Cir. 2016) as supporting their argument, in fact it
24 does no such thing. In Bos, the Ninth Circuit held that the
25 §523(a)(4) case before it was not within the ambit of Civil Code
26 §1717. Relevant to plaintiffs' contention, the Ninth Circuit
27 pointed out that:

1 Santisas and relevant Ninth Circuit cases establish not just
2 a rule of inclusion, but also a rule of exclusion: that if
3 the bankruptcy court did not need to determine whether the
4 contract was enforceable, then the dischargeability claim is
5 not an action on the contract within the meaning of [Civil
6 Code] §1717.

7 Bos, at 489 (citing Redwood Theaters, Inc. v. Davison (In re
8 Davison), 289 B.R. 716, 723 (9th Cir. B.A.P. 2003)).

9 Here, whether the APA or the 2009 Agreement were enforceable
10 was never a question and the interpretation of these agreements
11 was never an issue. Based on the above, this was not an action on
12 a contract. The APA and the 2009 Agreement provided the context
13 out of which this dispute arose, but this was not an action on a
14 contract. Civil Code §1717 does not provide a basis to award
15 attorney's fees.

16 **e. The APA's Indemnity Provision**

17 In §11.6(a) of the APA, defendants, as sellers, agreed to
18 "defend, indemnify and hold" plaintiffs, as buyers, "harmless
19 from and against any and all loss, damage, liability, action or
20 proceeding, including, without limitation, attorney's fees
21 resulting from or arising out of (i) any inaccuracy in or breach
22 of any representation, warranty, covenant, or obligation made or
23 incurred by sellers" in the APA or related agreements.

24 Plaintiffs contend that §11.6(a) entitles them to
25 indemnification from defendants for all loss in this litigation,
26 including attorney's fees. They then claim that §11.6(c) is a
27 third party indemnification provision that entitles them to
28 indemnification from defendants for all losses, including
29 attorney's fees, if plaintiffs are embroiled in litigation with

1 third parties.

2 Assuming (only for the sake of argument) that the language
3 of §11.6(a) is broad enough to cover a tort claim such as this
4 one, the question is whether it applies in litigation between the
5 parties to the APA. For several reasons, the court finds that
6 §11.6(a) does not operate as plaintiffs contend and §11.6 is
7 merely a third party indemnity provision.

8 Indemnity agreements are construed under the same rules
9 governing the interpretation of other contracts. Myers Building
10 Industries, Ltd. v. Interface Technology, Inc., 13 Cal.App.4th
11 949, 969 (1993).⁴

12 As the Ninth Circuit has explained:

13 A written contract must be read as a whole and every part
14 interpreted with reference to the whole. Furthermore, a
15 court must give effect to every word or term employed by the
16 parties and reject none as meaningless or surplusage.
17 Therefore, we must interpret the contract in a manner that
18 gives full meaning and effect to all of the contract's
19 provisions and avoid a construction of the contract that
20 focuses only on a single provision.

21 In re Crystal Props., Ltd., L.P., 268 F.3d 743, 748 (9th Cir.
22 2001) (quotation marks and internal citations omitted); See also
23 Natural Resources Defense Council, Inc. v. County of Los Angeles,
24 725 F.3d 1194, 1206 (9th Cir. 2013) (rejecting strained and
25 unreasonable interpretation of contract); Mastrobuono v. Shearson

26 ⁴ California Civil Code §2772 provides that "[i]ndemnity is
27 a contract by which one engages to save another from a legal
28 consequence of the conduct of one of the parties, or of some
other person." Civil Code §2778(1)-(7) is a set of rules to be
applied in interpreting an indemnity contract. Civil Code
§2778(3) provides that an indemnity against claims, or demands,
or liability embraces the costs of defense against such claims.
That is, attorney's fees are included by statute.

1 Lehman Hutton, Inc., 514 U.S. 52, 63 (1995) (it is a cardinal
2 principle of contract construction that a document should be read
3 to give effect to all of its provisions and to render them
4 consistent with each other).

5 First, §12.9 of the APA contains a specific attorney's fee
6 clause. Interpreting §11.6(a) as another attorney's fee provision
7 that is implicated in a dispute between the parties to the APA
8 renders §12.9 surplusage. Section 11.6(a) may arguably be a more
9 expansive fee provision because it uses the phrase "resulting
10 from or arising out of" any breach of any warranty. However,
11 plaintiffs' interpretation is precluded by the authorities
12 described above; it would make §12.9 surplusage and is therefore
13 an unreasonable interpretation of the APA.

14 Second, beyond that threshold point, a significant body of
15 California case law supports a finding that §11.6, in its
16 entirety, is a third party indemnification provision and does not
17 work as a prevailing party attorney's fee provision. The general
18 rule is that including attorney's fees as an item of loss in a
19 third party indemnity provision does not constitute a provision
20 for the award of attorney's fees in an action on the contract
21 itself which is required to trigger Civil Code §1717. Carr
22 Business Enterprises, Inc. v. City of Chowchilla, 166 Cal.App.4th
23 14, 20 (2008) (citing Myers Building Industries, Ltd. v.
24 Interface Technology, Inc., 13 Cal.App. 4th 949, 969 (1993)).

25 In Alki Partners, LP v. DB Fund Services, LLC, 4 Cal.App.5th
26 574 (2016), the court explained how courts distinguish third
27 party indemnification provisions from provisions for the award of

1 attorney's fees incurred in litigation between the parties to the
2 contract. First, the "key indicator is an express reference to
3 indemnification. A clause that contains the words 'indemnify' and
4 'hold harmless' generally obligates the indemnitor to reimburse
5 the indemnitee for any damages the indemnitee becomes obligated
6 to pay third persons - that is, it relates to third party claims,
7 not attorney fees incurred in a breach of contract action between
8 the parties to the indemnity agreement itself." Id., at 600
9 (citing Carr Business Enterprises, Inc. v. City of Chowchilla,
10 166 Cal.App.4th 14, 20 (2008)). The indemnification provision in
11 §11.6(a) uses this "shall indemnify and hold harmless" language
12 which is a strong indication it was only intended to cover third
13 party claims.

14 Second, courts examine the context in which the language
15 appears. Id., at 600. If the surrounding provisions describe
16 third party liability, the clause will be construed as a standard
17 third party indemnification provision. Id. (citing Myers Building
18 Industries, Ltd. v. Interface Technology, Inc., 13 Cal.App.4th
19 949, 970 (1993)(contract clause by which one party promised to
20 indemnify the other from "any, all and every claim which arises
21 out of the performance" of the contract dealt only with third
22 party claims).

23 A review of all three sub-parts of §11.6 shows this is a
24 third party indemnity provision. In §11.6(a), defendants, as
25 sellers, agree to indemnify plaintiffs, as buyers; in §11.6(b),
26 plaintiffs, as buyers agree to indemnify sellers. In §11.6(c),
27 the mechanics of addressing a third party indemnity claim are

1 explained. Section 11.6(c) begins by saying if "any legal
2 proceedings shall be instituted or any claim is asserted by any
3 third party in respect of which any Party may be entitled to
4 indemnity," then proceeds to describe the obligation to give
5 notice and the ability to participate in or control such an
6 indemnity action. Read together, these three sub-parts of §11.6
7 show that this is a third party indemnification provision and
8 does not, for this additional reason, support an award of
9 attorney's fees here.

10 **f. Costs**

11 Plaintiffs seek an award of \$11,748.25 in costs, citing Rule
12 7054(b) and 28 U.S.C. §1920 as the basis for awarding costs. Rule
13 7054(b)(1) provides that the court may allow costs to the
14 prevailing party and costs may be taxed by the clerk on 14 days'
15 notice. Although the request for costs is technically untimely,
16 for the reasons previously discussed, the court will consider it
17 on its merits.

18 Plaintiffs' request for costs does not provide the
19 documentation required by Civil Local Rule 54-1(a) or comply with
20 substantive limitations in 28 U.S.C. §1920. Civil Local Rule 54-
21 1(a), applicable here by Bankruptcy Local Rule 1001-2, requires a
22 prevailing party claiming taxable costs to serve and file a bill
23 of costs. The bill of costs must state separately and
24 specifically each item of taxable costs claimed and must be
25 supported by an affidavit pursuant to 28 U.S.C. §1924 that the
26 costs are correctly stated, were necessarily incurred, and are
27 allowable by law. In addition, appropriate documentation must be

1 attached to the bill of costs.

2 Plaintiffs did not file a bill of costs, and did not provide
3 any evidentiary support for their costs. In addition, plaintiffs'
4 \$11,748 total includes (1) many items that are not within the
5 categories stated in §1920(1)-(6); (2) many items that pre-date
6 the filing of this bankruptcy case; and (3) many items that
7 appear to involve the defendants' main case rather than this
8 adversary proceeding. At the hearing on this motion, plaintiffs'
9 counsel conceded that the requested costs were not in line with
10 §1920 and offered no authority for including costs incurred in
11 other proceedings.

12 For these reasons, the court exercises its discretion to
13 decline to award costs.

14 15 **IV. Conclusion**

16 For the foregoing reasons, the motion for attorney's fees
17 and costs is denied.

18 19 **V. Order**

20 Based on the above, plaintiffs' motion is denied. Each side
21 shall bear their own costs in this adversary proceeding. The
22 clerk's office is directed to close this adversary proceeding
23 following docketing of the Memorandum Decision and Order.

24
25 * * * **End of Memorandum Decision and Order** * * *

1
2 **Court Service List**

3
4 No service required.
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

28 *Memo. Decis. Fees & Costs*

21